

EXHIBIT 3

1 Steve W. Berman (*pro hac vice*)
 2 Emilee N. Sisco (*pro hac vice*)
 3 Stephanie Verdoia (*pro hac vice*)
 4 HAGENS BERMAN SOBOL SHAPIRO LLP
 5 1301 Second Avenue, Suite 2000
 6 Seattle, WA 98101
 Telephone: (206) 623-7292
 Facsimile: (206) 623-0594
 steve@hbsslaw.com
 emilees@hbsslaw.com
 stephaniev@hbsslaw.com

7 Benjamin J. Siegel (SBN 256260)
 8 HAGENS BERMAN SOBOL SHAPIRO LLP
 9 715 Hearst Avenue, Suite 202
 Berkeley, CA 94710
 Telephone: (510) 725-3000
 Facsimile: (510) 725-3001
 bens@hbsslaw.com

11 *Counsel for Plaintiffs and the Proposed Classes*

Jeffrey L. Kessler (*pro hac vice*)
 David G. Feher (*pro hac vice*)
 David L. Greenspan (*pro hac vice*)
 Adam I. Dale (*pro hac vice*)
 Sarah L. Viebrock (*pro hac vice*)
 WINSTON & STRAWN LLP
 200 Park Avenue
 New York, NY 10166-4193
 Telephone: (212) 294-4698
 Facsimile: (212) 294-4700
 jkessler@winston.com
 dfeher@winston.com
 dggreenspan@winston.com
 aidale@winston.com
 sviebrock@winston.com

Jeanifer E. Parsigian (SBN 289001)
 WINSTON & STRAWN LLP
 101 California Street, 34th Floor
 San Francisco, CA 94111
 Telephone: (415) 591-1000
 Facsimile: (415) 591-1400
 jparsigian@winston.com

Counsel for Plaintiffs and the Proposed Classes

14 [Additional counsel on signature page]

15 **UNITED STATES DISTRICT COURT**
 16 **NORTHERN DISTRICT OF CALIFORNIA**
 17 **OAKLAND DIVISION**

18 IN RE COLLEGE ATHLETE NIL
 19 LITIGATION

Case No. 4:20-cv-03919-CW

20 **PLAINTIFFS' REPLY MEMORANDUM IN**
SUPPORT OF MOTION FOR CLASS
CERTIFICATION

21 **[FILED UNDER SEAL]**

22 Date: Sept. 21, 2023
 Time: 2:30 p.m.
 Judge: Hon. Judge Claudia Wilken
 Courtroom: 2, 4th Floor

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ARGUMENT	3
A. Defendants' Opposition and Expert Reports Reinforce That Plaintiffs Have Shown That Common Evidence Can Prove Class-Wide Injury and Damages	3
1. All Class Members Were Injured by Their Lost Opportunity to Sell Their NIL	5
2. Broadcast NIL	5
a. Class-Wide Injury from Lost BNIL Compensation.....	5
b. Class-Wide Damages from Lost BNIL Compensation	7
3. Video Game NIL.....	10
a. Class-Wide Injury from Lost Video Game Compensation	10
b. Class-Wide Damages from Lost Video Game Compensation	11
4. Lost Compensation from Third-Party NIL Opportunities	12
a. Class-Wide Injury from Lost Third-Party NIL Compensation	12
b. Class-Wide Damages for Lost Third-Party NIL Compensation	12
B. Defendants' "Substitution Effects" Challenge Fails as a Matter of Law and Fact.....	13
C. There are No Intra-Class Conflicts That Preclude Class Certification	16
D. Defendants' Title IX Argument is a Red Herring.....	18
E. Defendants' State Laws Argument is Another Red Herring	19
F. Plaintiffs Satisfy the Rule 23(a) Adequacy Requirements	19
1. Plaintiffs Seek the Most Viable Remedies for All Class	

1	Members.	19
2	2. Tymir Oliver is an Adequate Representative for the Football and Men's Basketball Class.....	20
3		
4	III. CONCLUSION.....	20
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 TABLE OF AUTHORITIES
2Page(s)3 CASES
4

<i>Abboud v. I.N.S.</i> , 4 140 F.3d 843 (9th Cir. 1998)	5
<i>Achzinger v. IDS Prop. Cas. Ins. Co.</i> , 5 772 Fed. App'x 416 (9th Cir. 2019)	8
<i>Amchem Products, Inc. v. Windsor</i> , 7 521 U.S. 591 (1997).....	20
<i>Amgen, Inc. v. Conn. Ret. Plans and Tr. Funds</i> , 9 568 U.S. 455 (2013).....	6
<i>Andren v. Alere, Inc.</i> , 10 2017 WL 6509550 (S.D. Cal. Dec. 20, 2017).....	20
<i>In re Apple Inc. Device Performance Litigation</i> , 12 50 F.4th 769 (9th Cir. 2022)	20
<i>Berrien v. New Raintree Resorts Int'l, LLC</i> , 14 276 F.R.D. 355 (N.D. Cal. 2011).....	18
<i>Briseno v. Conagra Foods, Inc.</i> , 15 844 F.3d 1121 (9th Cir. 2017)	14
<i>In re Cathode Ray Tube (CRT) Antitrust Litig.</i> , 17 2020 WL 1873554 (N.D. Cal. Mar. 11, 2020).....	18
<i>CC Distributors, Inc. v. United States</i> , 19 883 F.2d 146 (D.C. Cir. 1989).....	5
<i>In re Cmtys. Bank of N. Va. Mortg. Lending Pracs. Litig.</i> , 20 795 F.3d 380 (3d Cir. 2015).....	18
<i>Comcast Corp. v. Behrend</i> , 22 569 U.S. 27 (2013).....	8, 10, 13
<i>In re Dynamic Random Access Memory (DRAM) Antitrust Litig.</i> , 24 2006 WL 1530166 (N.D. Cal. June 5, 2006)	6, 8
<i>Grant House v. Nat'l Collegiate Athletic Ass'n</i> , 25 545 F. Supp. 3d 804 (N.D. Cal. 2021)	5
<i>In re Glumetza Antitrust Litig.</i> , 27 336 F.R.D. 468 (N.D. Cal. 2020).....	15

1	<i>In re High-Tech Emp. Antitrust Litig.</i> , 985 F. Supp. 2d 1167 (N.D. Cal. 2015)	15
2		
3	<i>Just Film, Inc v. Buono</i> , 847 F.3d 1108 (9th Cir. 2017)	8
4		
5	<i>Kennedy v. Jackson Nat. Life Ins. Co.</i> , 2010 WL 2524360 (N.D. Cal. June 23, 2010)	19
6		
7	<i>In re Lidoderm Antitrust Litig.</i> , 2017 WL 679367 (N.D. Cal. Feb. 21, 2017)	8
8		
9	<i>Linney v. Cellular Alaska P'ship</i> , 151 F.3d 1234 (9th Cir. 1998)	18
10		
11	<i>In re Live Concert Antitrust Litig.</i> , 247 F.R.D. 98 (C.D. Cal. 2007)	12
12		
13	<i>Meijer, Inc. v. Abbott Lab'ys</i> , 2008 WL 4065839 (N.D. Cal. Aug. 27, 2008)	8
14		
15	<i>Mendell v. Am. Medical Response, Inc.</i> , 2021 WL 1102423 (S.D. Cal. 2021)	17
16		
17	<i>Moore v. Apple Inc.</i> , 309 F.R.D. 532 (N.D. Cal. 2015)	3
18		
19	<i>Moore v. James H. Matthews & Co.</i> , 682 F.2d 830 (9th Cir. 1982)	8
20		
21	<i>Morgan v. United States Soccer Fed'n, Inc.</i> , 2019 WL 7166978 (C.D. Cal. Nov. 8, 2019)	17
22		
23	<i>In re Nat'l Collegiate Athletic Ass'n Grant-in-Aid Cap Antitrust Litig.</i> , 375 F. Supp. 3d 1058 (N.D. Cal. 2019)	3
24		
25	<i>In re Nat'l Collegiate Athletic Ass'n Grant-In-Aid Cap Antitrust Litig.</i> , 311 F.R.D. 532 (N.D. Cal. 2015)	16, 17, 18
26		
27	<i>In re Nat'l Collegiate Athletic Ass'n Student-Athlete Name & Likeness Licensing Litig.</i> , 2013 WL 5979327 (N.D. Cal. Nov. 8, 2013)	13, 16, 17
28		
25	<i>In re Nat'l Football League's Sunday Ticket Antitrust Litig.</i> , 2023 WL 1813530 (C.D. Cal. Feb. 7, 2023)	15
26		
27	<i>In re NCAA I-A Walk-On Football Players Litig.</i> , 2006 WL 1207915 (W.D. Wash. May 3, 2006)	17
28		

1	<i>O'Bannon v. NCAA</i> , 802 F.3d 1049 (9th Cir. 2015)	<i>passim</i>
2		
3	<i>O'Connor v. Uber Techs., Inc.</i> , 311 F.R.D. 547 (N.D. Cal. 2015))	19
4		
5	<i>Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC</i> , 31 F.4th 651 (9th Cir. 2022)	3, 6, 14
6		
7	<i>In re Online DVD-Rental Antitrust Litig.</i> , 779 F.3d 934 (9th Cir. 2015)	16
8		
9	<i>Parrish v. NFLPA</i> , 2008 WL 1925208 (N.D. Cal. Apr. 29, 2008)	17
10		
11	<i>Pulaski v. Middleman, LLC</i> , 802 F.3d 979 (9th Cir. 2015)	8
12		
13	<i>Purple Mountain Tr. v. Wells Fargo & Co.</i> , 2022 WL 3357835 (N.D. Cal. Aug. 15, 2022)	3
14		
15	<i>Regents of Univ. of California v. Bakke</i> , 438 U.S. 265 (1978)	5
16		
17	<i>Serrato v. Clark</i> , 486 F.3d 560 (9th Cir. 2007)	5
18		
19	<i>Shields v. FINA</i> , 2022 WL 425359 (N.D. Cal. Feb. 11, 2023)	17
20		
21	<i>Sky Angel U.S., LLC v. Nat'l Cable Satellite Corp.</i> , 947 F. Supp. 2d 88 (D.D.C. 2013)	5
22		
23	<i>In re Static Random Access Memory (SRAM) Antitrust Litig.</i> , 264 F.R.D. 603 (N.D. Cal. 2009)	8
24		
25	<i>Todd v. Tempur-Sealy Int. Inc.</i> , 2016 WL 5746364 (N.D. Cal. Sep. 30, 2016)	19
26		
27	<i>Tyson Foods, Inc. v. Bouaphakeo</i> , 577 U.S. 442 (2016)	3, 4
28		
	<i>Vaquero v. Ashley Furniture Indus., Inc.</i> , 824 F.3d 1150 (9th Cir. 2016)	8
	<i>Whiteway v. FedEx Kinko's Off. & Print Servs., Inc.</i> , 2006 WL 2642528 (N.D. Cal. Sept. 14, 2006)	4

1	STATUTES
2	Sherman Act.....3, 17

3	FEDERAL RULES
4	Federal Rule of Civil Procedure 23 <i>passim</i>
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	

GLOSSARY OF DEFINED TERMS

TERM	DEFINITION
Motion or Class Certification Motion	Plaintiffs' Notice of Motion and Motion for Class Certification, Oct. 21, 2022 (ECF 209 (Sealed))
Rascher Report	Expert Report of Daniel A. Rascher, Oct. 21, 2022 (ECF 209-2 (Sealed))
Desser Report	Expert Report of Edwin S. Desser, Oct. 21, 2022 (ECF 209-3 (Sealed))
Opp.	Defendants' Joint Opposition to Plaintiffs' Motion for Class Certification, Apr. 28, 2023 (ECF 252 (Sealed))
Tucker Report	Defendants' Expert Report of Catherine Tucker, Apr. 28, 2023 (ECF 254-1 (Sealed))
Thompson Report	Defendants' Expert Report of Bob Thompson, Apr. 28, 2023 (ECF 254-2 (Sealed))
Rascher Reply	Expert Reply Report of Daniel A. Rascher, July 21, 2023, concurrently filed herewith
Desser Reply	Expert Reply Report of Edwin S. Desser, July 21, 2023, concurrently filed herewith
Berman Decl.	Steve W. Berman Declaration in Further Support of Plaintiffs' Motion for Class Certification, concurrently filed herewith
Ex.	Exhibits to Berman Declaration
Pl. Daubert Opp.	Plaintiffs' Opposition to Defendants' Motion to Exclude the Opinions, Reports, and Testimony of Edwin Desser and Daniel Rascher, concurrently filed herewith
Pl. Daubert Mot.	Plaintiffs' Motion to Exclude the Opinions of Defendants' Expert Dr. Barbara Osborne, concurrently filed herewith
Tucker Tr.	Official Transcript of Defendants' Expert Catherine Tucker on May 31, 2023, Ex. 57 to Berman Decl.
Thompson Tr.	Official Transcript of Defendants' Expert Bob Thompson on June 8, 2023, Ex. 58 to Berman Decl.
Oliver Tr.	Official Transcript of Plaintiff Tymir Oliver on Jan. 23, 2023, Ex. 64 to Berman Decl.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants' Opposition to Plaintiffs' Motion for Class Certification confirms that the proposed classes should be certified. Defendants do not oppose certifying the Injunctive Relief Class. And their arguments against certifying the three proposed damages classes—the Football and Men's Basketball Class, the Women's Basketball Class, and the Additional Sports Class—consist largely of merits-based arguments that reinforce why Plaintiffs' damages claims are ripe for resolution on a class-wide basis. Big picture, Defendants' innumerable criticisms of Plaintiffs' economic expert (Dr. Daniel Rascher) and sports broadcast expert (Mr. Edwin Desser) all go to their bottom-line conclusions, not their *methodologies*, which is what matters at class certification.¹

In fact, Defendants do not dispute that common evidence will determine the majority of issues critical to this case, including: the existence of a conspiracy affecting interstate commerce; Defendants' market power in the relevant labor markets; the anticompetitive effects of Defendants' restraints; and Defendants' putative procompetitive justifications. These common issues alone establish predominance under Rule 23(b)(3). Yet Plaintiffs have further established that each of the damages classes suffered at least one form of common injury, including at a minimum, the lost opportunity to participate in a competitive labor market in which they could monetize their NILs. As for the damages owed to each class member, Ninth Circuit law is clear that class certification is appropriate regardless of whether individualized damages determinations may be necessary. Still, Dr. Rascher supplies a class-wide damages model that is consistent with Plaintiffs' theory of liability and shows that damages are capable of measurement on a class-wide basis.

Against this backdrop, Defendants' arguments against class certification are unpersuasive. Starting with the Football and Men's Basketball Class's and Women's Basketball Class's damages claims to share in broadcast revenue, Defendants' economist (Catherine Tucker) argues that in the but-for world without NIL-compensation restraints, payments for the use of NILs in broadcasts ("BNIL") would not "necessarily" have been made to all class members. But Plaintiffs' experts have

¹ Plaintiffs show in their Opposition to Defendants' *Daubert* Motion, concurrently filed herewith, that their experts are well-qualified, and their opinions are relevant and based on reliable methodologies and considerable evidence.

1 shown that, in the but-for world, the intense competition for class members would have compelled
 2 Defendants to compensate them for selling their BNILs to networks in multibillion-dollar broadcast
 3 deals. Defendants' own broadcast expert agrees that no broadcaster ever would, or ever did, enter into
 4 a broadcast agreement without rights or protections for using all the participating athletes' BNILs.

5 As for the video game damages sought by the Football and Men's Basketball Class, Defendants
 6 again respond with merits arguments. Specifically, they argue that there may not have been college
 7 sports video games in the but-for world. But that argument has nothing to do with whether injury (or
 8 damages) relating to video games would have been class wide. In any event, Defendants ignore the
 9 overwhelming evidence that video game companies have been clamoring to use college athletes' NILs
 10 for years, and that college football and men's basketball games will return now that the video game
 11 publishers may pay to acquire and use college athletes' NILs.

12 Similarly, with respect to the Additional Sports Class's claims for the lost opportunity to pursue
 13 third-party NIL deals, Defendants again respond with merits challenges that are common to the class.
 14 Dr. Rascher reliably applied the well-accepted before-and-after methodology to show class-wide
 15 injuries. And, while Defendants try to obfuscate the critical distinction between class-wide injury (or
 16 common impact) and damages, almost all of Defendants' arguments concern Dr. Rascher's
 17 methodology for allocating individual damages, which is not a basis to deny class certification.

18 Defendants' laundry list of remaining arguments likewise fail. For example, Defendants,
 19 hoping to shoehorn the *O'Bannon* result here, contend that "substitution effects" make the classes
 20 unmanageable to identify injured class members. But unlike *O'Bannon*, here it is a "virtually
 21 mechanical task" to identify the class members who have been injured by Defendants' conduct. There
 22 are no predominance or manageability problems at all as injury is class wide. Moreover, Dr. Rascher's
 23 empirical analysis shows that the hypothesized displacement theory that underpins Defendants'
 24 substitution effects argument is contrary to the evidence, both in terms of the number of college
 25 athletes who would have made different choices (*e.g.*, staying in school or switching schools), and the
 26 number of athletes (if any) who would have been displaced by losing scholarships. Further still, the
 27 Ninth Circuit recently made clear that a damages class can be certified even if there are a material
 28

1 number of class members who may not have been injured in the but-for world.²

2 Defendants also argue that Title IX is an obstacle to class certification. But they rely almost
3 exclusively on the inadmissible and erroneous legal conclusions of Professor Barbara Osborne. *See*
4 Pl. *Daubert* Mot. at 5-12. Even if Dr. Osborne's opinions were admissible, they raise only common
5 issues that are irrelevant to whether the classes should be certified.

6 Finally, Defendants argue that there are conflicts between and among the classes because
7 different amounts of damages are estimated for different class members. Yet Defendants' own expert
8 has admitted that a "soundly based" damages methodology—as Dr. Rascher's is here—does not create
9 a conflict, "even though it might affect class members differently." Ex. 57 (Tucker Tr.) 204:3-205:3.

10 II. ARGUMENT

11 A. Defendants' Opposition and Expert Reports Reinforce That Plaintiffs Have Shown 12 That Common Evidence Can Prove Class-Wide Injury and Damages

13 "To establish a claim under Section 1 of the Sherman Act, Plaintiffs must show 1) that there
14 was a contract, combination, or conspiracy; 2) that the agreement unreasonably restrained trade under
15 either a per se rule of illegality or a rule of reason analysis; and 3) that the restraint affected interstate
16 commerce."³ As in *Alston*, only issue two is in dispute.

17 Defendants primarily challenge class certification under the predominance requirement of Rule
18 23(b)(3). To establish predominance, "[e]ach element of a claim need not be susceptible to classwide
19 proof."⁴ But even focusing on the one disputed element here, "the inquiry is a holistic one, in which
20 the Court considers whether overall, considering the issues to be litigated, common issues will
21 predominate."⁵ Where "one or more of the central issues in the action are common to the class and
22 can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though

23 ² *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 (9th Cir.
24 2022).

25 ³ *In re Nat'l Collegiate Athletic Ass'n Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058,
26 1091 (N.D. Cal. 2019).

27 ⁴ *Purple Mountain Tr. v. Wells Fargo & Co.*, 2022 WL 3357835, at *2 (N.D. Cal. Aug. 15, 2022);
see also Motion at 25-26 (explaining how common evidence will show the existence of a conspiracy).

28 ⁵ *Moore v. Apple Inc.*, 309 F.R.D. 532, 544 (N.D. Cal. 2015); see *Tyson Foods, Inc. v. Bouaphakeo*,
577 U.S. 442, 453 (2016) ("[t]he predominance inquiry 'asks whether the common, aggregation-
enabling, issues in the case are more prevalent or important than the non-common, aggregation-
defeating individual issues'" (quoting 2 NEWBERG ON CLASS ACTIONS § 4:49, pp. 195-96 (5th
ed. 2012))).

1 other important matters will have to be tried separately, such as damages or some affirmative defenses
 2 peculiar to some individual class members.”⁶

3 Defendants do not deny that several core elements of proving or defending a rule-of-reason
 4 claim here are common to all class members. Defendants do not dispute that common evidence will
 5 be used to establish the relevant markets or Defendants’ market power. Nor do they dispute that
 6 evidence common to the classes will be used to determine the existence of anticompetitive effects.
 7 And they do not dispute that assessing any procompetitive justifications or less restrictive alternatives
 8 will all be common issues to be resolved on a class-wide basis.⁷ “Where . . . common questions
 9 predominate regarding liability, then courts generally find the predominance requirement to be
 10 satisfied even if individual damages issues remain.”⁸ Defendants’ concession that these fundamental
 11 elements of Plaintiffs’ rule-of-reason claim rest on common issues is, on its own, sufficient for the
 12 Court to find that Plaintiffs have satisfied Rule 23’s predominance requirement.

13 Defendants instead focus their opposition on their contention that Plaintiffs’ alleged injury and
 14 damages present predominantly individualized issues. Not so. Common evidence will establish that
 15 Defendants’ NIL rules deprived all class members of an opportunity to participate in a competitive
 16 labor market for monetizing their NILs, which is a cognizable antitrust injury. And common expert
 17 evidence will be used to show class-wide injury and damages from three additional categories of
 18 antitrust injuries: (1) the lost opportunity to receive BNIL (which injured the Football and Men’s
 19 Basketball Class and the Women’s Basketball Class); (2) the lost opportunity to receive compensation
 20 for use of NILs in college football and men’s basketball video games (which injured the Football and
 21 Men’s Basketball Class and some members of the Additional Sports Class); and (3) the lost
 22 opportunity to receive NIL compensation from third-parties under the Prior NIL Rules (which injured
 23 the entire Additional Sports Class, plus many members of the Football and Men’s Basketball Class
 24 and the Women’s Basketball Class).

25
 26
 27 ⁶ *Tyson*, 136 S. Ct. at 1045.
 28 ⁷ See Motion at 26-27 (discussing these common issues).
 ⁸ *Whiteway v. FedEx Kinko's Off. & Print Servs., Inc.*, 2006 WL 2642528, at *10 (N.D. Cal. Sept. 14, 2006) (citing *Smilow v. Sw. Bell Mobile Sys.*, 323 F.3d 32, 40 (1st Cir. 2003)).

1 **1. All Class Members Were Injured by Their Lost Opportunity to Sell Their NIL**

2 All members of all Plaintiffs' damages classes suffered common antitrust injury as a result of
 3 Defendants' prohibiting their opportunity to earn NIL compensation. Mot. at 28. As the Court held:
 4 “[a] plaintiff can show that it was injured in fact by alleging that it was deprived of the opportunity to
 5 receive compensation it otherwise would have received but for the challenged conduct.”⁹

6 Defendants assert that lost NIL opportunities are not a cognizable form of antitrust injury for
 7 purposes of class certification. Defendants cite exactly zero cases for this proposition. And their
 8 experts do not dispute that *all* class members were deprived of the opportunity to monetize their NIL.
 9 This, in turn, caused economic harm to each class member. *See Rascher Reply ¶¶ 21, 25-30.*

10 Defendants cite the Ninth Circuit's decision in *O'Bannon* (Opp. at 37), but ignore that the
 11 Court held there that “plaintiffs have shown that they are injured in fact as a result of the NCAA’s
 12 rules having *foreclosed the market for their NILs* in video games.”¹⁰ The Ninth Circuit went on to hold
 13 that “the NCAA’s rules deny plaintiffs all opportunity to receive this compensation,” and based on
 14 that lost opportunity, the athlete-plaintiffs had shown “injury in fact, and by extension the requirement
 15 of antitrust injury.”¹¹ Other cases in a variety of contexts have reached similar conclusions.¹²

16 **2. Broadcast NIL**

17 **a. Class-Wide Injury from Lost BNIL Compensation**

18 Plaintiffs rely on the expert opinions of Dr. Rascher and Mr. Desser to establish Broadcast NIL

19 ⁹ *Grant House v. Nat'l Collegiate Athletic Ass'n*, 545 F. Supp. 3d 804, 816 (N.D. Cal. 2021) (citing
 20 13A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3531.4 (3d ed. 1998)
 21 (“Loss of opportunity may constitute injury, even though it is not certain that any benefit would have
 22 been realized if the opportunity had been accorded.” (collecting cases)).

23 ¹⁰ *O'Bannon v. NCAA*, 802 F.3d 1049, 1067 (9th Cir. 2015) (emphasis added).

24 ¹¹ *Id.* at 1069; *see also Sky Angel U.S., LLC v. Nat'l Cable Satellite Corp.*, 947 F. Supp. 2d 88, 107
 25 (D.D.C. 2013) (lost opportunity to participate in a competitive market constitutes injury in fact).

26 ¹² *See, e.g., Serrato v. Clark*, 486 F.3d 560, 566 (9th Cir. 2007) (plaintiff, in a case alleging
 27 violations of the APA, “suffered cognizable injury for standing purposes” where defendant’s conduct
 28 denied plaintiff the “ability to be considered for a program,” regardless of whether plaintiff may have
 ultimately ended up in that program (emphasis in original)); *Abboud v. I.N.S.*, 140 F.3d 843, 847 (9th
 Cir. 1998) (where plaintiff “lost a significant opportunity . . . [the] lost opportunity represents a
 concrete injury”); *CC Distributors, Inc. v. United States*, 883 F.2d 146, 150 (D.C. Cir. 1989) (“loss of
 an opportunity to pursue a benefit” was cognizable “even though the plaintiff may not be able to show
 that it was certain to receive that benefit had it been accorded the lost opportunity”) (emphasis in
 original); *see also Regents of Univ. of California v. Bakke*, 438 U.S. 265, 281 n.14 (1978) (lost
 opportunity to compete for a place in a University class was sufficient to establish injury).

1 class-wide injury and damages. Attacking their opinions on the merits, Defendants contend that
 2 Plaintiffs' "BNIL injury and damages theory is fatally speculative and contrary to the record." See
 3 Opp. at 23-24. But even if these assertions had merit (they do not), Defendants ignore the law. The
 4 Ninth Circuit's *en banc* decision in *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*
 5 recently reaffirmed that at class certification, "a district court is limited to resolving whether the
 6 evidence establishes that a common question is *capable* of class-wide resolution, not whether the
 7 evidence in fact establishes that plaintiffs would win at trial."¹³ This is consistent with the Supreme
 8 Court's holding in *Amgen* that putative classes are only required to "show[] that *questions* common to
 9 the class predominate, not that those questions will be answered, on the merits, in favor of the class."¹⁴
 10 As *Olean* explained: "A lack of persuasiveness is not fatal at class certification."¹⁵ Rather, Plaintiffs'
 11 need only "come forward with seemingly realistic methodologies" to demonstrate class-wide injury.¹⁶

12 Plaintiffs easily meet this requirement. Mr. Desser—based on, among other things, his
 13 extensive industry experience and analysis of Defendants' broadcast agreements and analogous real-
 14 world data—will be able to provide common evidence about the economic value of class members'
 15 BNIL for football and basketball telecasts. As Mr. Desser explained, and as Defendants' broadcast
 16 expert (Thompson) confirmed, because no one knows in advance which players will be shown on the
 17 field or on the bench, Redacted - NSC

18 Desser Report, p. 37; Ex. 58 (Thompson Tr.) 52:7-53:8,
 19 49:16-50:2. Dr. Rascher also relies on common economic evidence and economic theory to show that,
 20 in the but-for world, competition among the Power Five Conferences would have compelled them to
 21 provide BNIL payments to *all* full scholarship football and basketball players, *i.e.*, *all* members of the
 22 Football and Men's Basketball Class and Women's Basketball Class. Rascher Report ¶¶ 105-167.

23 Defendants' attacks on these expert opinions go to the merits and, regardless, present common

25 ¹³ 31 F.4th 651, 666-67 (9th Cir. 2022).

26 ¹⁴ *Amgen, Inc. v. Conn. Ret. Plans and Tr. Funds*, 568 U.S. 455, 459 (2013) (emphasis in original).

27 ¹⁵ *Olean*, 31 F.4th at 679. At this stage, Plaintiffs are not required to actually prove antitrust injury
 to each class member and need only demonstrate that impact may be established through class-wide
Id.

28 ¹⁶ *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 2006 WL 1530166, at *8 (N.D.
 Cal. June 5, 2006); *accord Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346, 353 (N.D. Cal. 2005).

1 issues. The arguments thus support, rather than undermine, Plaintiffs' motion for class certification.
 2 For example, Defendants argue that "nothing supports the existence of an independent market for
 3 BNIL rights." Opp. at 24. But that argument rises or falls for every class member. *See* Rascher Report
 4 ¶¶ 151-153; Rascher Reply ¶ 18.

5 Next, Defendants argue that this case is analogous to *O'Bannon* because ascertaining who
 6 would get BNIL payments purportedly creates the "impossibility of 'determining which student-
 7 athletes were actually depicted' in game footage 'during the relevant class period,' and thus allegedly
 8 entitled to compensation." Opp. at 32 (quoting *O'Bannon*, 2013 WL 5979327, at *9). That is not true
 9 because, in this case, the combination of Mr. Desser's industry expertise and Dr. Rascher's
 10 methodology leads to the conclusion that *all* full-COA Power Five football and basketball players
 11 would have received BNIL compensation, *i.e.*, regardless of whether they actually appear in telecasts.
 12 Rascher Report ¶ 163; Rascher Reply ¶¶ 94-96; Desser Report p. 40. Defendants may dispute the
 13 *merits* of that opinion, but unlike in *O'Bannon*, there is no need to make individualized inquiries about
 14 who appeared in telecasts.

15 Defendants go on to contest Dr. Rascher's methodology of how BNIL payments would have
 16 been distributed in the but-for world. But this is a *merits*-based argument about *damages* allocations.
 17 And it is a class-wide argument anyway. For example, Defendants argue that schools (not conferences,
 18 as Dr. Rascher opines) would make BNIL payments. *See* Opp. at 24. Dr. Rascher explains, however,
 19 that conference-based payments are economically rational because conferences are the ones that
 20 aggregate school broadcasting rights, enter broadcast deals with the networks, and distribute the
 21 revenues to member schools. Rascher Report ¶¶ 151, 156; Rascher Reply ¶¶ 85-86. Resolution of this
 22 debate is immaterial to class certification.

23 **b. Class-Wide Damages from Lost BNIL Compensation**

24 Defendants again advance a merits argument common to the class in contending that Plaintiffs'
 25 model for measuring class-wide BNIL damages does not reflect what Defendants would have done in
 26 the but-for world. But the Supreme Court in *Comcast* explained that the only damages inquiry at class
 27 certification is whether the proposed model is consistent with plaintiffs' theory of liability and whether
 28

1 damages are “capable of measurement on a class-wide basis.”¹⁷ The Ninth Circuit further has held that
 2 ““capable of measurement on a classwide basis”” means “in the sense that the whole class suffered
 3 damages traceable to the same injurious course of conduct underlying plaintiffs’ legal theory.”¹⁸ As
 4 set forth below, Plaintiffs easily satisfy these standards.

5 Plaintiffs must merely show that their class-wide damages methodology is not “so insubstantial
 6 as to amount to no method at all.”¹⁹ In antitrust cases in particular, once the fact of injury is established,
 7 plaintiffs have a “relaxed burden” of proving the amount of damages.²⁰ This relaxed burden applies
 8 with equal force in the context of proving class-wide damages.²¹ And even if the Court were to
 9 conclude that some individualized damages calculations are necessary, that would not defeat class
 10 certification where, as here, common issues relating to antitrust liability predominate.²²

11 Defendants also argue that valuing BNIL rights at 10% of Defendants’ broadcast agreement
 12 revenues is “speculative” and solely “for litigation.” *See, e.g.*, Opp. at 7-8, 23-24. This too has nothing
 13 to do with predominance; it is a merits critique. That said, Defendants ignore the fact that separately
 14 valuing BNIL rights is not required in other sports leagues (like the NFL, NBA, and WNBA) because
 15 athletes are permitted to be paid for their NIL *plus* athletic services in a single compensation package.

17 ¹⁷ *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013).

18 ¹⁸ *Just Film, Inc v. Buono*, 847 F.3d 1108, 1120 (9th Cir. 2017) (quoting *Comcast*, 569 U.S. at 34).

19 ¹⁹ *Meijer, Inc. v. Abbott Lab’ys*, 2008 WL 4065839, at *10 (N.D. Cal. Aug. 27, 2008) (quoting *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 697 (D. Minn. 1995)).

20 ²⁰ Rule 23(b)(3)—Application of predominance requirement to particular cases—Antitrust—
 Extent of damages, 1 McLaughlin on Class Actions § 5:37 (18th ed.); *Moore v. James H. Matthews &*
Co., 682 F.2d 830, 836 (9th Cir. 1982) (“[A]n antitrust plaintiff is only obligated to provide the trier-
 of-fact with some basis from which to estimate reasonably, and without undue speculation, the
 damages flowing from the antitrust violations.”).

21 ²¹ *DRAM*, 2006 WL 1530166, at *10 (“[A]t the certification stage of an antitrust class action,
 plaintiffs have a limited burden with respect to showing that individual damages issues do not
 predominate.” (citation and internal quotation marks omitted)); *In re Static Random Access Memory*
(SRAM) Antitrust Litig., 264 F.R.D. 603, 615 (N.D. Cal. 2009) (Wilken, J.) (similar).

22 ²² *See e.g., Pulaski v. Middleman, LLC*, 802 F.3d 979, 986-88 (9th Cir. 2015) (reaffirming that this
 proposition from “*Yokoyama [v. Midland Nat’l Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010)]
 remains the law of this court, even after *Comcast*”); *Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d
 1150, 1155 (9th Cir. 2016) (“Under *Tyson Foods* and our precedent, therefore, the rule is clear: the
 need for individual damages calculations does not, alone, defeat class certification.”); *accord In re*
Lidoderm Antitrust Litig., 2017 WL 679367, at *11 (N.D. Cal. Feb. 21, 2017); *see also Achzinger v.*
IDS Prop. Cas. Ins. Co., 772 Fed. App’x 416, 418 (9th Cir. 2019) (“district court abused its discretion”
 in denying class certification “by giving more weight to potential individual damages disputes than
 common questions of liability”); *see also* Motion at 29.

1 Other sports leagues thus have no reason to isolate the value players provide through their BNIL, like
 2 Plaintiffs must do here, because Plaintiffs do not challenge Defendants' prohibition on pay-for-
 3 performance. Rascher Report ¶ 164; Desser Report at 27-28. Nor do broadcasters who are similarly
 4 purchasing a package of different rights, including BNIL and many others, for a single price. Mr.
 5 Desser's 10% Opinion is not only conservative and reliable, but also is common to the class, as would
 6 be any different percentage value for BNIL (which Defendants have not even proffered).²³

7 Defendants similarly argue that it is "speculative" for Mr. Desser to opine that in Defendants'
 8 multisport broadcast contracts, [REDACTED]
 9 [REDACTED]

10 [REDACTED] .” Desser Report at 61-62; *see Opp.* at 6-8, 23-24. This is
 11 yet another merits dispute that is irrelevant to class certification. It is also a frivolous position given
 12 the admissions of Defendants' broadcast industry expert that, prior to being retained by Defendants,
 13 he repeatedly offered a virtually identical allocation opinion. Ex. 58 (Thompson Tr.) 149:2-170:21.²⁴

14 Next, Defendants contend that because superstar football and basketball players have greater
 15 NIL values, Dr. Rascher's opinion is "speculative" that conferences would provide BNIL payments in
 16 equal shares. *See Opp.* at 23-24; Tucker Report ¶¶ 92-98. This is more of the same: a merits argument
 17 that is common to the classes and directed to the allocation of damages. It is also wrong. Defendants'
 18 experts admit, and Dr. Rascher explains, that broadcasters need the BNIL for *all* players well in
 19 advance of a broadcast, regardless of any individual athlete's expected performance status, and that
 20 equal share payments are the typical market outcome when large groups of athletes' NILs are licensed
 21 for the same product. Ex. 58 (Thompson Tr.) 44:21-45:17; Rascher Reply ¶¶ 94-101; *see also* Ex. 57
 22 (Tucker Tr.) 143:11-146:2; 147:12-148:17 (not refuting the foregoing). Defendants also ignore that
 23 conferences already have a practice of equally distributing broadcast revenues, despite differences in
 24 school values. Ex. 58 (Thompson Tr.) 132:17-20. And, as a practical matter, it would be

25
 26 ²³ *See also* Pl. Daubert Opp. at 10-14.

27 ²⁴ *See* Ex. 58 (Thompson Tr.) 170:1-6, 161:17-163:18; *see also* Ex. 59 (Thompson Dep. Ex. 84)
 28 ("We'll put 80 percent [of the Big Ten's multisport media agreement] or \$280m against the football.");
 Ex. 60 (Thompson Dep. Ex. 83) ("I assume MBK [men's basketball] represents around 20-25% of the
 value of the [Big 12's multisport broadcast rights agreement].").

1 administratively infeasible to conduct player-by-player BNIL valuations. For all these reasons, Dr.
 2 Rascher's equal-sharing damages model is not only plausible but persuasive.

3 Finally, Defendants argue that "Plaintiffs' BNIL model does not match [their] theory of
 4 liability, precluding certification under *Comcast*." *See Opp.* at 24. This makes no sense. Plaintiffs
 5 allege that absent the NIL Rules, competition would have led to payments to Power Five football and
 6 basketball players for their BNILs. Defendants argue that Dr. Rascher's damages model is inconsistent
 7 with Plaintiffs' liability theory because he opines that BNIL payments would likely have come from
 8 the conferences, whereas Defendants contend that the payments would have come from the schools.
 9 *Opp.* at 24. But that is a merits debate, not a *Comcast* issue: Dr. Rascher's methodology is perfectly
 10 consistent with plaintiffs' liability theory. He opines that part of the way schools compete with one
 11 another in the relevant labor market is to form conferences, which offer benefits to members, and by
 12 extension, athletes. Conferences aggregate schools' broadcast rights, negotiate conference-wide
 13 broadcast agreements, affirmatively convey athletes' BNILs to broadcasters (or indemnify
 14 broadcasters for using athletes' BNILs), and distribute broadcast revenues to their member schools. In
 15 the but-for world, therefore, Dr. Rascher opines that it is the conferences that would have offered class
 16 members payments for their BNILs through a group license. Rascher Report ¶¶ 154-158; Rascher
 17 Reply ¶¶ 85-86, 93-94. There is no mismatch between Plaintiffs' liability theory and Dr. Rascher's
 18 BNIL damages model.

19 3. **Video Game NIL**

20 a. **Class-Wide Injury from Lost Video Game Compensation**

21 Defendants' short section arguing that the Football and Men's Basketball Class does not satisfy
 22 Rule 23(b)(3) for injuries and damages based on lost video games NIL payments is merits-based and
 23 unpersuasive. *See Opp.* at 33-34. Defendants first argue that Plaintiffs have "put forth no argument
 24 that any video game company would have made a men's college basketball game at any point 'during
 25 the class period . . .'" *Opp.* at 33 (quoting Mot. at 10). For starters, this is not an argument against
 26 predominance because it applies equally to all class members. The argument is also demonstrably
 27 wrong. Redacted - Highly Confidential Counsel Only

1 Redacted - Highly Confidential Counsel Only

2 [REDACTED] See Mot. at 9-10.²⁵ During the damages period, EA wrote to the NCAA stating
 3 that [REDACTED - Confidential] [REDACTED] " citing the millions of units previously sold
 4 of [REDACTED - Confidential]

5 and proclaiming that [REDACTED - Confidential]

6 [REDACTED] " Mot. at 10 (quoting statement). It
 7 was thus reasonable for Dr. Rascher to model a but-for world in which a college basketball video game
 8 including players' NILs would exist. Rascher Report ¶¶ 55-63, 125-132; Rascher Reply ¶¶ 63, 73-75.

9 Defendants also suggest that it is speculative for Dr. Rascher to model that there would have
 10 been a college football video game in the but-for world because it has been "nearly two years since
 11 the NCAA enacted its Interim NIL Policy," and "no games appear imminent." Opp. at 33-34. Putting
 12 aside that this is yet another class-wide merits dispute irrelevant to class certification, the facts cited
 13 by Dr. Rascher overwhelmingly demonstrate that EA would have produced a football video game
 14 throughout the damages period if it could have obtained player NIL. And EA recently announced that
 15 it *will* indeed publish a new college football game, with athletes' NIL and will reportedly pay athletes
 16 equally. Rascher Reply ¶¶ 76-78.

17 **b. Class-Wide Damages from Lost Video Game Compensation**

18 Defendants assert that "[Dr.] Rascher puts forward no evidence to support his proposed [video
 19 game] damages model." Opp. at 34. In reality, Defendants merely dispute the merits of the evidence
 20 and facts Dr. Rascher relied upon. Dr. Rascher sets forth the basis for his video game damages model
 21 at length. Rascher Report ¶¶ 125-149. And Defendants' expert, Professor Tucker, does not even try to
 22 challenge his methodology. Rascher Reply ¶ 62.

23

24

25

26 ²⁵ Redacted - Highly Confidential Counsel Only

27 Rascher Report ¶ 132. Redacted - Redacted - Highly Confidential Counsel Only

See

28 *Id.*

1 **4. Lost Compensation from Third-Party NIL Opportunities**

2 **a. Class-Wide Injury from Lost Third-Party NIL Compensation**

3 Dr. Rascher’s before-and-after methodology shows that all Additional Sports Class members,
 4 and many members of the other classes, were injured by being deprived of NIL compensation from
 5 third parties. This methodology is widely accepted by courts—particularly in antitrust class actions.²⁶
 6 Here, Dr. Rascher applies his model to those athletes who: (i) secured at least one third-party NIL deal
 7 in the “after” period (demonstrating that they have NIL value to third parties); and (ii) participated in
 8 their sport for at least one year during the “before” period (and thus, were precluded from realizing
 9 their third party NIL value during that time).

10 Defendants contend that individualized differences between the before and after periods
 11 preclude using this methodology. *See Opp.* at 34-36. But the before-after-approach is particularly apt
 12 in a case like this when the real-world after period permits third-party NIL compensation, and the
 13 before period did not. Rascher Report ¶ 186. As for Defendants’ contention that there are material
 14 differences between the before and after periods, Dr. Rascher addressed this by developing
 15 adjustments to his methodology to provide a common way to account for material differences in supply
 16 and demand. Rascher Reply ¶¶ 129-49. Defendants may dispute how to apply Dr. Rascher’s
 17 adjustments—or which adjustments should be made—but those are merits disputes for trial.

18 **b. Class-Wide Damages for Lost Third-Party NIL Compensation**

19 Defendants contend that Dr. Rascher has insufficiently described his damages methodology
 20 and that its implementation would involve “excessive difficulty.” *Opp.* at 35-36. Purported “difficulty”
 21 in a class-wide methodology is not a ground to oppose class certification—especially when it comes
 22 to damages allocations. Dr. Rascher detailed his methodology and adjustments that could be made at
 23 the merits stage in his opening report, and his reply report demonstrates how his adjustments would
 24 account for differences in the before and after periods by applying them to a sample of class members.

25

26 ²⁶ *In re Live Concert Antitrust Litig.*, 247 F.R.D. 98, 145 (C.D. Cal. 2007) (collecting cases for the
 27 proposition that the “before-and-after methodology has been accepted by numerous courts” as a way
 28 of determining impact and damages on a class-wide basis); *see also* Ex. 57 (Tucker Tr.) 140:9–142:2
 (explaining her use of the before-and-after methodology in a prior litigation); *id.* at 52:3–53:7
 (admitting that ABA treatise discussing the before-and-after approach “certainly seemed solid”).

1 Rascher Report ¶¶ 179-220; Rascher Reply ¶¶ 129-49. This is more than enough under *Comcast* and
 2 Ninth Circuit law to support class certification.

3 *Ward v. Apple Inc.* is inapt. See Opp. at 22 (citing 784 F. App'x 539, 540 (9th Cir. Nov. 13,
 4 2019) (mem. op.)). There, plaintiffs' expert "merely asserted that he would be able to develop a model
 5 at some point in the future." *Id.* at 541. Here, Dr. Rascher *presented* a model with Plaintiffs' class
 6 certification motion, described it and potential adjustments to it in detail, and has now illustrated how
 7 those adjustments would be applied at trial. Rascher Report ¶¶ 179-220; Rascher Reply ¶¶ 129-49.

8 **B. Defendants' "Substitution Effects" Challenge Fails as a Matter of Law and Fact**

9 Defendants seek to revive the "substitution effects" argument which they previously advanced
 10 in *O'Bannon*. Defendants argue that in the but-for world some talented scholarship athletes at Power
 11 Five schools would have remained in school longer and some athletes would have accepted a Power
 12 Five offer instead of a non-Power Five offer because Broadcast NIL payments would have been
 13 available, thereby displacing some Football and Men's Basketball and Women's Basketball class
 14 members who obtained Power Five scholarships in the actual world. According to Defendants, these
 15 displaced class members would be "worse off" in the but-for world, and are therefore uninjured,
 16 purportedly providing grounds to deny class certification. Defendants are wrong on both the law and
 17 the facts.

18 *First*, this Court's ruling in *O'Bannon* is of no help to Defendants here. The *O'Bannon*
 19 damages class was rejected because the Court was persuaded that it would be unmanageable to identify
 20 class members by reviewing hours of old broadcasts and video games to determine which athletes
 21 appeared.²⁷ Here, by contrast, the members of the Football and Men's Basketball Class, and Women's
 22 Basketball Class, are easily identified because the classes consist of *all* full scholarship athletes on
 23 Power Five football and basketball teams, regardless of whether the players actually appeared in
 24 particular broadcasts. Moreover, the Ninth Circuit has altered the law on manageability under Rule 23
 25 since *O'Bannon*, holding that identifying class members need not be "administratively feasible."²⁸

26
 27 ²⁷ *In re Nat'l Collegiate Athletic Ass'n Student-Athlete Name & Likeness Licensing Litig.*, 2013
 28 WL 5979327, at *3, *8-*10 (N.D. Cal. Nov. 8, 2013) ("O'Bannon").

²⁸ *Briseno v. Conagra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017).

Instead, the Ninth Circuit now applies a “presumption that courts should not refuse to certify a class merely on the basis of manageability concerns.”²⁹

Second, even if Defendants' purported substitution effects could lead to some uninjured class members, it would not be grounds to deny class certification. The Ninth Circuit's *en banc* decision in *Olean* made clear that the presence of even a significant number of uninjured class members does not defeat class certification.³⁰ There, a grant of class certification was upheld even though defendants' expert opined that up to 28% of the putative class could have been uninjured, and here Tucker does not even estimate how many uninjured class members she claims are present. Tucker Rep. ¶¶ 22, 90.

Third, Dr. Rascher uses empirical data to demonstrate that any substitution effect would not have any material impact on the proposed classes. To begin with, the data show that college athletes' receipt of additional compensation (full-COA scholarships, *Alston* payments, and other enhanced benefits) has not resulted in a marked increase in the number of athletes choosing to stay in school rather than turn professional. Rascher Report ¶¶ 227-33; *see also* Rascher Reply ¶ 164. Nor could BNIL compensation because of the few slots available in the professional league drafts. Rascher Report ¶ 228; Rascher Reply ¶ 157, 164. Further, the data show that Power Five schools had sufficient open scholarship slots to absorb athletes who stayed in school without displacing a material number of class members to non-Power Five schools. Rascher Report ¶¶ 119-20; Rascher Reply ¶¶ 156, 164.

Fourth, Defendants’ substitution effect argument rests on the false premise that some purportedly displaced class members were not injured by the challenged NIL rules because they were better off in the actual world where they received a Power Five scholarship. But such displaced class members would still be injured because, as Dr. Rascher shows, all Division I athletes—irrespective of the conference they play in—have been deprived of the ability to monetize their Broadcast NIL. Rascher Reply ¶¶ 153, 159. While Plaintiffs are not seeking BNIL damages for non-Power Five athletes, that does not change the fact that the challenged NIL Rules applied to all Division I athletes with equal force. Moreover, even if a class member would not have secured a scholarship and benefits from a Power Five school in the but for world, Rascher opines that he or she would have received a

²⁹ *Id.* at 1128 (quoting *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 663 (7th Cir. 2015)).

³⁰ *Olean*, 31 F.4th at 669.

1 comparable full scholarship and benefits from a school in a non-Power Five conference and would
 2 therefore, be no “worse off” in the but-for world than in the real world. Rascher Reply ¶ 170.

3 Moreover, there is no factual support for Tucker’s so-called “ripple effect” in which class
 4 members would be displaced from a Power Five conference school because Broadcast NIL payments
 5 would cause some athletes, who in the actual world chose a school in a non-Power Five conference
 6 over a school in a Power Five conference, to make a different choice in the but-for world. In his Reply
 7 Report, Dr. Rascher shows that Tucker’s purported empirical analysis of this ripple effect was based
 8 on a fundamental misunderstanding of the data that she used. Specifically, as she admitted at her
 9 deposition, Tucker did not realize that the self-reported data she relied upon listed far more scholarship
 10 offers from Power Five schools than it was possible for those schools to honor under NCAA rules. Ex.
 11 57 (Tucker Tr.) 57:9-18. There is thus no reliable evidence to support Tucker’s speculation that a
 12 material number of athletes who enrolled at a non-Power Five school could have instead chosen a
 13 school in a Power Five conference in the but for world. Rascher Reply ¶¶ 179-88.

14 In any event, the law is clear that class certification cannot be denied based on Defendants’
 15 speculation about how “class members would face different effects, including harm, [in] the but-for
 16 world based on each member’s unique preferences.”³¹ Where, as here, “Defendants’ market-wide
 17 anticompetitive conduct” impacts the “baseline price to class members,” the predominance
 18 requirement is satisfied without the need to hypothesize about whether individual class members
 19 would have been displaced in the but-for world.³²

20 Finally, because, as Dr. Rascher opines, all full-scholarship FBS football and Division I men’s
 21 basketball players would have received compensation in the but-for for the use of their NIL in video
 22 games, there can be no dispute that, regardless of any claimed substitution effects related to BNIL, all

23 ³¹ *In re Nat'l Football League's Sunday Ticket Antitrust Litig.*, 2023 WL 1813530, at *12 (C.D.
 24 Cal. Feb. 7, 2023); *see also In re Glumetza Antitrust Litig.*, 336 F.R.D. 468, 479 (N.D. Cal. 2020)
 25 (“[T]he vagaries of the marketplace usually deny us sure knowledge of what plaintiff’s situation
 26 would have been in the absence of the defendant’s antitrust violation. . . . Plainly, we can’t know
 exactly what would have happened in that but-for world; defendants saw to that.” (internal quotation
 marks omitted)).

27 ³² *See also In re High-Tech Emp. Antitrust Litig.*, 985 F. Supp. 2d 1167, 1192-93 (N.D. Cal. 2015)
 28 (in certifying a labor market class subject to a competition restraint, the court found no need to consider
 whether higher wages in the but-for world would have caused the workers who held those jobs in the
 actual world to be replaced).

1 members of the Football and Men’s Basketball Class (which is limited to the most elite FBS football
 2 and Division I men’s basketball programs) would still be injured based on lost video game
 3 compensation. Similarly, there is no substitution effects issue for Additional Sports Class members,
 4 as all of these class members lost third-party NIL opportunities regardless of the school they attended.

5 **C. There are No Intra-Class Conflicts That Preclude Class Certification**

6 Defendants speculate about a non-existent conflict between class members seeking BNIL
 7 damages. They falsely assert that Plaintiffs seek a “fixed sum” of compensation in a manner that is
 8 “structurally antagonistic.” Opp. at 29-30. Their argument, however, boils down to the fact that Dr.
 9 Rascher’s damages methodologies will lead to some class members receiving more in damages than
 10 others—an unremarkable reality of virtually all damages classes (antitrust or otherwise).

11 Ninth Circuit precedent, and this Court’s previous decisions, make clear that such hypothetical
 12 and speculative “conflicts” are not a basis for denying class certification.³³ And even Defendants’
 13 economist admitted that a “soundly based” damages methodology does not create a conflict “even
 14 though it might affect class members differently.” Ex. 57 (Tucker Tr.) 204:3-205:3.

15 Contrary to precedent and their own expert, Defendants nonetheless argue that individual class
 16 members and the classes as a whole are in conflict because of disparate preferences for models that
 17 would provide each with more damages at the expense of other classes and class members. Opp. at
 18 30-31. But, as this Court held in *O’Bannon*, conflicts over the *allocation* of damages are not a basis
 19 for denying class certification and do not alter each class member’s common and predominant interest
 20 in establishing that Defendants violated the Sherman Act.³⁴

21 Speculation over whether absent class members here *may* want to “optimize their own
 22 recovery” is distinct from the situation in *Shields v. FINA* and *In re NCAA I-A Walk-On Football*

23 ³³ See *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 942 (9th Cir. 2015) (“we do not
 24 ‘favor denial of class certification on the basis of speculative conflicts’”); *O’Bannon*, 2013 WL
 25 5979327, at *6 (“Even if Plaintiffs’ method of allocating damages did create such a conflict, this would
 26 not be sufficient to prevent class certification.”); *In re Nat’l Collegiate Athletic Ass’n Grant-In-Aid
 Cap Antitrust Litig.*, 311 F.R.D. 532, 541 (N.D. Cal. 2015).

27 ³⁴ *O’Bannon*, 2013 WL 5979327, at *6; *C.f. Parrish v. NFLPA*, 2008 WL 1925208 (N.D. Cal. Apr.
 28 29, 2008) (“the overwhelming majority of putative class members have received nothing at all under
 the [group licensing agreements]” and therefore concluded that “[i]t is in the interest of each GLA
 class member to determine if they are entitled to anything at all beyond the whim and discretion of
 defendants.”).

1 *Players Litigation* (Opp. at 29-31) where the courts found that athletes would have been *required* to
 2 prove injury by demonstrating that they—and not another class member—would have shared in a
 3 fixed prize pool or a scholarship instead of another class member.³⁵ Here, Dr. Rascher opines that *all*
 4 members of the relevant classes (Football and Men’s Basketball and Women’s Basketball) would have
 5 been paid for BNIL (Rascher Report ¶ 150); there is thus no issue of one class member asserting that
 6 she would have been paid for her BNIL but another class member would not have been.

7 The Court held Defendants’ other asserted conflict to be “illusory” twice, in both *Alston* and
 8 *O’Bannon*.³⁶ As the recycled argument goes, Defendants speculate that Dr. Rascher’s BNIL damages
 9 methodology will lead to lower revenue teams being cut because an “athletic department’s budget”
 10 creates a “zero-sum game” for non-revenue-generating sports. Opp. at 30-31. But there is no reliable
 11 evidence to show that Defendants’ latest “doomsday” scenario is a non-speculative outcome, let alone
 12 one that creates a concrete conflict.³⁷ Defendants cite self-serving and familiar declarations making
 13 conclusory claims that BNIL payments would lead to the termination of certain teams.³⁸ The Court
 14 may recall similar doomsday testimony by Wisconsin’s Chancellor during the *Alston* trial, testimony
 15

16 ³⁵ *Shields v. FINA*, 2022 WL 425359, at *7 (N.D. Cal. Feb. 11, 2023) (each individual class
 17 swimmer’s proof of damages “would necessarily involve arguing that other swimmers in her club
 18 would not have been selected to swim, that she would have beaten the swimmers she raced against,
 19 and that other clubs would not have performed as well as her club over the course of the season”); *In
 re NCAA I-A Walk-On Football Players Litig.*, 2006 WL 1207915, at *8 (W.D. Wash. May 3, 2006)
 (“each class member will have to offer proof that necessarily will involve arguing that a threshold
 number of other players would not have gotten that same [remedy].”).

20 ³⁶ *In re Nat’l Collegiate Athletic Ass’n Grant-In-Aid Cap Antitrust Litig.*, 311 F.R.D. at 544;
 21 *O’Bannon*, 2013 WL 5979327, at *6.

22 ³⁷ *Mendell v. Am. Medical Response, Inc.*, 2021 WL 1102423, at *3 (S.D. Cal. 2021)
 23 (citing Newberg on Class Actions) (“Courts generally decline to find that the class fails to meet the
 24 adequacy requirement under Rule 23(a)(4) unless a party presents concrete evidence of a conflict of
 25 interest.”); *Morgan v. United States Soccer Fed’n, Inc.*, 2019 WL 7166978, at *8 (C.D. Cal. Nov. 8,
 26 2019) (“Without some evidence of an actual conflict, the Court presumes that that the representation
 27 is adequate.”) (citing *Californians for Disability Rights v. California Dept. of Transp.*, 249 F.R.D. 334,
 28 349 (N.D. Cal. 2008) (“Adequate representation is usually presumed in the absence of contrary
 evidence.”)); *Berrien v. New Raintree Resorts Int’l, LLC*, 276 F.R.D. 355, 359 (N.D. Cal. 2011)
 (Wilken, J.) (“[T]he mere potential for a conflict of interest is not sufficient to defeat class certification;
 the conflict must be actual, not hypothetical.”)

29 ³⁸ See *In re Nat’l Collegiate Athletic Ass’n Grant-In-Aid Cap Antitrust Litig.*, 311 F.R.D. at 541,
 30 544 (“[d]efendants fail[ed] to recognize their own role” when “speculating about intra-class conflicts”
 31 and the conflicts depended on the “assumption that schools could not afford to spend more money
 32 compensating all student-athletes rather than cutting payments to some”).

1 that was recanted less than 24 hours later.³⁹ Dr. Rascher has examined the *actual* history of increases
 2 in compensation to athletes and found no correlation to any decline in non-revenue sports. Rascher
 3 Reply ¶¶ 36-38.

4 As this Court has previously held, Defendants' claimed conflicts are either illusory or not
 5 fundamental to proving Defendants' liability. And in the unlikely event they do arise at the damages
 6 allocation stage, they can and should be managed at that time.⁴⁰

7 **D. Defendants' Title IX Argument is a Red Herring**

8 Defendants argue that Dr. Rascher's BNIL damages model would violate Title IX because it
 9 results in more damages for male athletes than female athletes. Opp. at 28-29. This is just another
 10 argument that goes to the ultimate merits and is totally unrelated to class certification. Although
 11 nothing more need be said at this time, the dearth of support for Defendants' argument bears emphasis.

12 They cite no case law—because there is none—that Title IX applies to damages awards. So,
 13 Defendants instead hired an “expert” to offer an unsupported legal opinion. As set forth in Plaintiffs’
 14 *Daubert* Motion, Osborne’s opinions are both inadmissible and contrary to precedent. On top of the
 15 fact that Title IX does not apply to damages awards, Osborne admitted that Title IX does not apply to
 16 conferences (which do not receive federal money) either.⁴¹

17 Further, the undisputed reason that Dr. Rascher’s damages methodology estimates more BNIL
 18 damages for male athletes than female athletes is because in the actual world, *Defendants* receive far
 19 more broadcast revenues from football/men’s basketball than women’s basketball. For example, the
 20 recent independent Gender Equity Study commissioned by the NCAA concluded that there is “a
 21 culture within the NCAA in which men’s basketball is not required to abide by the same budgetary

22
 23
 24 ³⁹ Ex. 73 (Nick Bromberg, *Wisconsin: ‘No plans to stop offering athletics’ in wake of chancellor’s testimony in player-compensation trial*, Yahoo! (Sept. 18, 2018).

25 ⁴⁰See e.g., *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2020 WL 1873554, at *7 (N.D. Cal.
 26 Mar. 11, 2020) (appointment of separate counsel in amended settlement “eliminated concerns” of new
 27 conflict of interest); *In re Cnty. Bank of N. Va. Mortg. Lending Pracs. Litig.*, 795 F.3d 380, 394 (3d
 28 Cir. 2015) (recognizing ability “to appoint separate counsel to represent newly divergent interests” in
 the future); *Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1239 (9th Cir. 1998) (“addition of new
 and impartial counsel can cure a conflict of interest”).

⁴¹ See Ex. 61 (Osborne Tr.) at 49:12–20.

1 constraints as women's basketball.”⁴² All Dr. Rascher and Mr. Desser did was opine on how BNIL
 2 money damages would be allocated according to *Defendants'* real-world conduct.

3 E. Defendants' State Laws Argument is Another Red Herring

4 Defendants speculate that a handful of state laws, which at one point or another after July 2021
 5 precluded direct NIL payments from conferences to athletes, would have “sprung into effect earlier,”
 6 preventing the BNIL payments modeled by Dr. Rascher in the but for world. Opp. at 16. One is left
 7 again to wonder what this argument has to do with class certification. It is also rank speculation and
 8 counterfactual. No state NIL law was in effect before July 2021, when Defendants temporarily
 9 eliminated some NIL Rules. Furthermore, states enacted such laws to force Defendants to *permit* NIL
 10 compensation, not to limit it.⁴³ Accordingly, if Defendants had permitted NIL compensation sooner,
 11 there is no reason to believe that states would have enacted NIL laws at all. Rascher Reply ¶ 41.

12 F. Plaintiffs Satisfy the Rule 23(a) Adequacy Requirements

13 1. Plaintiffs Seek the Most Viable Remedies for All Class Members.

14 Plaintiffs are pursuing the most viable remedies on behalf of the classes they seek to represent.
 15 Defendants incorrectly assert that Plaintiffs are inadequate representatives because they are
 16 abandoning certain remedies to the detriment of some class members. Opp. at 38. Adequacy does
 17 not—and could not—require plaintiffs to pursue every conceivable theory of recovery.⁴⁴ As this Court
 18 has previously ruled, Plaintiffs may pursue those theories that “afford the greatest likelihood of success
 19 on behalf of the class.”⁴⁵ Courts thus distinguish defendants showing that the “named plaintiff is
 20 advancing his or her own interests at the expense of the class” from “the mere fact that a named
 21 plaintiff elects not to pursue one particular claim.”⁴⁶ There is no evidence whatsoever that Plaintiffs

22 ⁴² Ex. 62 at 58 (Kaplan Hecker & Fink, *NCAA External Gender Equity Review Phase I: Basketball*
 23 *Championships*, (August 2, 2021)).

24 ⁴³ Ex. 63 (Dan Murphy, *California Defies NCAA as Gov. Gavin Newsom Signs Into Law Fair Pay*
to Play Act, ESPN.com (Sept. 30, 2019)).

25 ⁴⁴ See *Todd v. Tempur-Sealy Int. Inc.*, 2016 WL 5746364, at *5 (N.D. Cal. Sep. 30, 2016) (“A
 26 strategic decision to pursue those claims a plaintiff believes to be most viable does not render her
 27 inadequate as a class representative.”).

28 ⁴⁵ *Kennedy v. Jackson Nat. Life Ins. Co.*, 2010 WL 2524360, at *5 (N.D. Cal. June 23, 2010)
 (Wilken, J.).

29 ⁴⁶ See *O'Connor v. Uber Techs., Inc.*, 311 F.R.D. 547, 565 (N.D. Cal. Dec. 9, 2015), *rev'd and*
remanded on other grounds, 904 F.3d 1087 (9th Cir. 2018), (citing *In re Universal Service Fund Tel.*
Billing Practices Litig., 219 F.R.D. 661, 669 (D. Kan. 2004)).

fall into the former category. And, as Defendants' own cases recognize, if absent class members wish to pursue other damages remedies, they may opt-out.⁴⁷

2. Tymir Oliver is an Adequate Representative for the Football and Men's Basketball Class.

Defendants attack the adequacy of Tymir Oliver, a former Division I football player at a Power Five Conference school, as the Football and Basketball Class representative, asserting there must be a basketball player class representative. They are incorrect. To be adequate, a class representative “must be part of the class and possess the same interest and suffer the same injury as the class members.”⁴⁸

Contrary to Defendants' bizarre suggestion, Mr. Oliver is not required to have been friends with basketball players while in college, nor to watch college basketball now. Opp. at 38-39. Mr. Oliver possesses the same interest as basketball players in proving class-wide injury and Defendants' antitrust liability. Moreover, Football and Men's Basketball Class members all suffered the same types of injuries—lost BNIL and video game compensation, and lost opportunities for third-party NIL deals—during the same time frame.⁴⁹ As Mr. Oliver testified, football and men's basketball players “put the same time in, same hours, everything like that,” and were subject to the same NIL restraints.

Although Mr. Oliver is more than an adequate class representative for the Football and Men's Basketball Class, if the Court were to find otherwise, it should certify the proposed classes conditioned on the addition of a basketball player as another class representative.

III. CONCLUSION

Plaintiffs respectfully request that the Court certify each of the proposed classes.

⁴⁷ See *Andren v. Alere, Inc.*, 2017 WL 6509550, *8 (S.D. Cal. Dec. 20, 2017) (citing *Slade v. Progressive Sec. Ins. Co.*, 856 F.3d 408, 413 (5th Cir. 2017) (“Courts have noted that any risk of preclusion can be mitigated through the opt-out provision under Rule 23(b)(3).”)).

⁴⁸ *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997).

⁴⁹ See supra, Section II.A (describing these injuries); *In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 781 (9th Cir. 2022) (certifying a settlement class and finding no conflict where all class members “experienced injury during the same time frame and in the same manner”).

1 Dated: July 21, 2023

Respectfully submitted,

2 HAGENS BERMAN SOBOL SHAPIRO LLP

WINSTON & STRAWN LLP

3 By: /s/ Steve W. Berman

By: /s/ Jeffrey L. Kessler

4 Steve W. Berman (*pro hac vice*)

Jeffrey L. Kessler (*pro hac vice*)

5 Emilee N. Sisco (*pro hac vice*)

David G. Feher (*pro hac vice*)

Stephanie Verdoia (*pro hac vice*)

David L. GreenSpan (*pro hac vice*)

6 HAGENS BERMAN SOBOL SHAPIRO LLP

Adam I. Dale (*pro hac vice*)

1301 Second Avenue, Suite 2000

Sarah L. Viebrock (*pro hac vice*)

Seattle, WA 98101

WINSTON & STRAWN LLP

Telephone: (206) 623-7292

200 Park Avenue

Facsimile: (206) 623-0594

New York, NY 10166-4193

steve@hbsslaw.com

Telephone: (212) 294-4698

emilees@hbsslaw.com

Facsimile: (212) 294-4700

stephaniev@hbsslaw.com

jkessler@winston.com

11 Benjamin J. Siegel (SBN 256260)

dfeher@winston.com

HAGENS BERMAN SOBOL SHAPIRO LLP

dgreenSpan@winston.com

12 715 Hearst Avenue, Suite 202

aidale@winston.com

Berkeley, CA 94710

sviebrock@winston.com

13 Telephone: (510) 725-3000

Jeanifer E. Parsigian (SBN 289001)

14 Facsimile: (510) 725-3001

WINSTON & STRAWN LLP

bens@hbsslaw.com

101 California Street, 34th Floor

15 Jeffrey L. Kodroff

San Francisco, CA 94111

16 SPECTOR ROSEMAN & KODROFF PC

Telephone: (415) 591-1000

17 Two Commerce Square

Facsimile: (415) 591-1400

2001 Market Street, Suite 3420

jparsigian@winston.com

Philadelphia, PA 19103

Counsel for Plaintiffs and the Proposed Classes

Telephone: (215) 496 0300

Facsimile: (215) 496 6611

jkodroff@srkattorneys.com

21 *Counsel for Plaintiffs and the Proposed Classes*

- 21 -

ATTESTATION PURSUANT TO CIVIL LOCAL RULE 5-1(i)(3)

Pursuant to Civil Local Rule 5-1(i)(3), the filer of this document attests that concurrence in the filing of this document has been obtained from the signatories above.

/s/ Steve W. Berman
STEVE W. BERMAN